No. 12501

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEYER SCHNEIDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

JOHN B. TANSIL,
United States Attorney,
Great Falls, Montana;

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Attorneys for Appellee.

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BRIEF OF APPELLEE

THE RECORD

The record in this case has not been prepared in accordance with the Rules of Procedure. The Federal Rules of Criminal Procedure provide that the rules and practice governing the preparation and form of the record on appeal in civil actions shall apply to the record on appeal in all criminal proceedings, except as otherwise provided in the Rules of Criminal Procedure. (Rule 39(b)(1)).

It is to be noted that the appellant has not complied with Rule 75(a) of the Rules of Civil Procedure. That Rule provides:

> "(a) Designation of Contents of Record on Appeal. Promptly after an appeal to a court of appeals is taken, the appellant shall serve upon the appellee and file with the district court a designation of the portions of the

record, proceedings, and evidence to be contained in the record on appeal, unless the appellee has already served and filed a designation. Within 10 days after the service and filing of such a designation, any other party to the appeal may serve and file a designation of additional portions of the record, proceedings, and evidence to be included. If the appellee files the original designation the parties shall proceed under subdivision (b) of this rule as if the appellee were the appellant."

There has been no designation of the record on appeal either served upon the appellee or filed with the District Court. This affirmatively appears from the Transcript of Record herein. The appellant did file a statement of points apparently in an attempt to comply with the provisions of Rule 75(d). This designation of points was not served upon appellee. It, of course, would have been unnecessary to serve and file a concise statement of the points on which the appellant intended to rely if he had served and filed a designation of the portions of the record to be contained in the record on appeal and designated the whole record. We find now, in his brief, appellant asks this Court to supplement the record that has been printed herein.

In appellant's brief, the statement is made "Appellant's requests to charge, omitted from the record through inadvertence, are appended hereto". (Br. 3). Beginning at Page 45 is the appendix referred to.

We submit that this Court should not permit appellant to supplement the record in this case by appending a portion of the record to his brief. We cannot concur in the statement that the omission was through inadvertence. The omission resulted solely from the appellant's failure to comply with the Federal Rules of Civil Procedure.

STATEMENT OF FACT

The statement of fact contained in appellant's brief appears to be inadequate. Hence, this statement.

In the month of August, 1948, there was a surplus of scrap material at the Great Falls Army Airbase (R. 78). Invitations to bid on this scrap material were mailed to prospective bidders in the months of August and September of 1948 (R. 78).

Harvey B. Apperson, First Lieutenant, United States Air Force (R. 59), in the performance of his duties, and in conjunction with the purchasing and contracting officer, mailed out the invitations to bid (R. 78). The appellant here, Meyer Schneider, was the successful bidder on the scrap wool and cotton materials (R. 79-80). Schneider did not immediately come from his place of business in New York City to Great Falls, Montana, to take possession of the material and make payment in accordance with his bid. The contract provided that he was to remove the material from the Base within ten days (R. 82-83). On November 15th, the defendant Schneider had a telephone conversation with Lieutenant Apperson, the Base Salvage Officer, in which it was pointed out that the space being used to store the material purchased by the Defendant Schneider was needed. (R. 82-83). It was arranged during that telephone conversation between Meyer Schneider and Lieutenant Apperson that Meyer Schneider would be in Montana on the 16th or 17th of November, 1948. He did not appear. As a result, Lieutenant Apperson called him long distance and again advised him to come out and remove the material. Otherwise, his contract might be cancelled and the

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deposit made forfeited (R. 83-84). The defendant stated he would come to Great Falls, Montana, on November 22, 1948. On the morning of November 22, 1948, the defendant was in Great Falls, Montana, and a meeting was arranged for 10:00 or 10:30 A. M. that day at the Airbase (R. 84-85).

At about 10:00 A. M., Sergeant Raymond P. Aulgur, the non-commissioned officer in charge of the Base Salvage Office, met the defendant at the main gate of the Airbase pursuant to instructions given him by Lieutenant Apperson (R. 218-219).

When the two arrived at the Base Salvage Office, there were piles of surplus clothing apparent. (R. 219 and Record 85-86). At this point, it became apparent that Schneider intended to do more than pick up the scrap material on which he had been the successful bidder. Before the arrival of Lieutenant Apperson at the Base Salvage Office, he had a conversation with Sergeant Aulgur and suggested the possibility of the Sergeant profiting by "a deal between the two of us." (R. 221).

It becomes necessary to call attention briefly to the duties assigned to Lieutenant Apperson as Base Salvage Officer. (R. 340, 140-142).

The testimony of Major C. E. Redding, Adjutant General of the Base, was that Lieutenant Apperson was Base Salvage Officer from August, 1948, until February, 1949, and specifically was Base Salvage Officer on November 22 and 23, 1948, the dates referred to in the indictment. (R. 146-147). Some of the duties assigned to Lieutenant Apperson appear from excerpts of "Exhibit 1" read into the record. (R. 70-77). He was to act for

the Commanding Officer on all salvage activities at the Base. He was not accountable for property turned in for salvage but was responsible for the proper storage and disposition of salvage turned over to him. (R. 70). He was required to protect the interests of the Government and to prevent errors, fraud or theft (R. 76).

To get back to the events at the Great Falls Airbase on November 22. Lieutenant Apperson came into the Salvage Office at about the time that the improper proposals were being made by the defendant to Sergeant Aulgur. (R. 221). This was at about 10:30 A. M. (R. 85). The defendant walked into the back part of the warehouse with Lieutenant Apperson and inquired about merchandise other than that already purchased by him. The defendant next proposed that he and the Lieutenant get together and trade, or substitute, some of the salvage material for the scrap that had been purchased by the defendant. He informed Lieutenant Apperson that he would give him half a quid to a couple of Gs and said he had the money right there, slapping his brief case to indicate the presence of the money to take care of the Lieutenant (R. 88). Schneider informed Lieutenant Apperson that there was money to be made in this sort of business and in the fashion proposed by him. (R. 89). He demonstrated a knowledge of the operations of the Quartermaster and informed Lieutenant Apperson concerning his operations at other bases (R. 90). Lieutenant Apperson did not accede to any of the proposals made but was non-committal. (R. 90). The defendant was shown the merchandise he had purchased (R. 89) and at about 11:15 or 11:30 A. M. left the Airbase (R. 90).

An appointment was arranged for the following day at about 2:00 o'clock in the afternoon. (R. 93).

The following day, November 23, Lieutenant Apperson met the defendant at the main gate of the Airbase and drove him to the Salvage Office. The Lieutenant placed a jacket file in front of Schneider containing a list of useful salvage items that were in storage at the Airbase at that time. (R. 94). Schneider opened it and the Lieutenant pointed to the cost of the salvage to the Government, (R. 94), which sum was upwards of $36,000.00. (R. 104). When this material was sold, it brought in to the Government $8,000.00. (R. 148-149). Arrangements were made for the employment of Army personnel to be paid by Schneider, to load material which the defendant had legitimately purchased. (R. 95-96).

Lieutenant Apperson and Schenider went to a warehouse on the Airbase, Warehouse Number 1045. This warehouse contained a large amount of salvage clothing and none of the scrap legitimately purchased (R. 96). The defendant directed the loading of this material on a truck and then from the truck on to a freight car (R. 96-97). The quantity was stated to be almost a warehouse full. (R. 97). The defendant kept note of what was taken from Warehouse Number 1045 and loaded into the freight car at the Airbase (R. 98-100). When that warehouse was practically empty (R. 103-104), the defendant, in company with Lieutenant Apperson, supervised some of the loading of the scrap material that Schneider had contracted to purchase from the Government. (R. 104-107). It is to be remembered that the items contained in Warehouse Number 1045

were salvage items as distinguished from scrap material, and that no purchase of the salvage material in Warehouse 1045 had been made.

Thereafter, Schneider and Lieutenant Apperson left the Airbase and came into the City of Great Falls. (R. 106-107). They first entered a bar and had a couple of drinks (R. 107). They then went to Schneider's room at the Park Hotel in Great Falls, Montana (R. 108). After some discussion about paying off, the defendant stated "I will give you $1400.00." The Lieutenant did not say anything but indicated dissatisfaction. Whereupon Schneider counted out $1500.00 and gave it to the Lieutenant (R. 110-111). The Lieutenant requested an envelope in which to place the $1500.00, which consisted of fifty twenty dollar bills and fifty ten dollar bills. He was furnished an envelope having the defendant's letterhead on it. (R. 110-112). Lieutenant Apperson left the room at the Park Hotel within a very few minutes. Before leaving, Schneider told him that he hoped this was not the last deal they would have and told him that if he ran into anything that might be of interest to not hesitate to call him collect at his New York residence (R. 111-112). Just as soon as the Lieutenant arrived in the Lobby of the Park Hotel, he handed the envelope containing the $1500.00 to Federal Bureau of Investigation Agents (R. 112-113), who had been advised of the defendant's conduct on November 22, 1948, and who had so far as possible kept in touch with the events that occurred on November 23, 1948. The agents went to Room 340 at the Park Hotel and placed Schneider under arrest (R. 258).

An indictment was returned charging in two counts a violation of the provisions of Section 201, Title 18, United States Code. The first count charged that on or about the 22nd day of November, 1948, the defendant promised a bribe, and the second count charged the giving of a bribe on or about November 23, 1948.

SUFFICIENCY OF INDICTMENT

The contention is made in Appellant's brief that doubt is cast upon the indictment by reason of the fact that the caption of the first count of the indictment cites Section 201, Title 18 U. S. C. "Offer of Bribe"; and that the charge contained in Count 1 charges a promise of a bribe. It is clear that the contention that this is error or ground for dismissal of the indictment is without merit. Rule 7(c) of the Rules of Criminal Procedure provides that an indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provisions of law which the defendant is alleged therein to have violated. The rule provides further:

> "Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice."

A review of the record in this case will readily demonstrate that the error did not mislead appellant to his prejudice.

The appellant relies upon the case of *Blunden, et al. v. United States, 169 F. (2d) 991* to contend that the indictment in this case is insufficient as a matter of law. It appears from what is stated about the information in that case that the charge was not as complete as the

charge made in this case. In the Blunden case, the information did not charge the appellants with the intent to influence to commit a fraud on the United States or to make opportunity for the committing of a fraud, yet, as pointed out by the Court, those additional offenses are included within the terms of Section 201 of Title 18, U. S. C.

The contentions made by the appellant that the indictment in this case is insufficient as a matter of law overlook entirely the Rules of Criminal Procedure. The indictment in this case is sufficient and we believe what was said by this Court in *United States v. Bickford, 168 F. (2d) 26* is particularly applicable. The District Judge in that case held the indictment fatally defective because it did not aver that the Clerk of the Court had competent authority to administer an oath to Bickford who was charged by indictment with perjury. The Court stated:

> "The criminal rules were designed to simplify existing procedure and to eliminate outmoded technicalities of centuries gone by. Certainly Rule 7(c) was not intended to be less liberal than is the modern practice of the federal courts to consider the adequacy of indictments on the basis of practical as opposed to technical considerations. It has long been settled in the federal jurisdiction that an indictment is good if (1) it states facts sufficient to inform the defendant of the offense with which he is charged, and (2) if its averments be sufficiently certain to safeguard the accused from a second prosecution for the same act. Hagner v. United States 285 U. S. 427, 52 Ct. 417, 76 L. Ed. 861; Berger v. United States 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314; Hopper v. United States, 9 Cir., 142 F. 2d 181. As observed in Hagner v. United States, supra, at page 433 of 285 U. S., at page 420 of 52 S. Ct., 'It is enough that the necessary facts

appear in any form, or by fair construction can be found within the terms of the indictment. Measured by these standards, the sufficiency of the indictment before us is not open to debate."

Mention is made in appellant's brief of the fact that the two counts of the indictment relate but to a single transaction. Any contention that it is improper to allege the offenses here in two counts cannot be sustained as stated by the court in

United States v. Michelson,
165 F. (2d) 732.

"We think that Congress, as it lawfully may, provided that to 'offer' a bribe and to 'give' a bribe are two distinct crimes even when parts of a single transaction, since the one (to 'give') involves an element which the other (to 'offer') does not. The test, as stated in Morgan v. Devine, 237 U. S., 632, 640, 35 S. Ct. 712, 714, 59 L. Ed. 1153, is 'whether separate acts have been committed with the requisite criminal intent.' * * *"

This court fully discussed a contention of this kind in the case of

Catrino v. United States
176 F. (2d) 884

The foregoing decisions are particularly applicable to this case as the promise to give a bribe was made on November 22, 1948, and on the following day, November 23, 1948, the bribe of $1,500.00 was paid.

It is submitted that the counts of the indictment herein conform to the decisions of this Court on the sufficiency of the indictment under the new Rules of Criminal Procedure.

ON THE PROPOSITION THAT THE GOVERNMENT FAILED TO PROVE THE COMMISSION OF A CRIME WITHIN THE SCOPE OF THE STATUTE AND FAILED TO PROVE THAT LIEUTENANT APPERSON HAD ANY AUTHORITY OR OFFICIAL DUTY IN CONNECTION WITH THE SALE OR DISPOSITION OF GOVERNMENT SURPLUS PROPERTY.

The appellant, under Point 2 in his brief, submits the proposition to this Court. He would have this Court believe that there was no matter pending before Apperson for official action and that there was no unlawful act or violation of duty induced by the appellant. He quotes evidence from the record in this case in an attempt to establish a lack of authority vested in Lieutenant Apperson to negotiate a sale of the merchandise taken from Warehouse 1045 by appellant. It is to be noted that the statute prohibits a fraud or the making of an opportunity for the commission of a fraud on the United States and further prohibits the inducing to do or omit to do an act in violation of lawful duty.

The indictment in this case is drawn in accordance with the statute and does incorporate in both counts an allegation that the defendant acted as he did with the intent to influence Lieutenant Apperson to allow and make opportunity for the commission of a fraud on the United States, and to do an act in violation of his lawful duty.

The record does not contain, in its entirety, plaintiff's Exhibit Number 1, the United States Air Force Regulations governing the duties of Base Salvage Officer (R. 70). The portions of plaintiff's Exhibit Number 1 read to the jury are included in the record (R. 70-77). At

the outset, the regulations governing Lieutenant Apperson as Base Salvage Officer provide:

> "The salvage officer acts for the Commanding Officer on all salvage activities at his installation. He is *not accountable* for property turned in for salvage but *is responsible at all times for the proper storage and the disposition of salvage turned over to him.* The salvage officer will exercise strict supervision over all transactions and will use due caution and diligence *to prevent irregularities or opportunities for fraud and/or collusion.*" (Italics supplied). (R. 70).

We call particular attention to the fact that the salvage officer is not accountable for property turned in for salvage (R. 70).

It appears further from the regulations that the Base Salvage Officer could dispose of property other than by sale (R. 72).

Under certain circumstances, spot negotiated sales could be made. The regulations provide:

> "'Spot negotiated sales' and contracts will be processed as follows: (1) The Base Salvage Officer will: (a) Obtain written authorization from the area salvage officer to conduct the sale by the spot negotiation sales method. Requests will contain a complete statement of all facts relevant to the proposed sale and a statement showing that the Government will obtain a more definite tangible benefit by use of the spot negotiation method of sale than would be obtained through competitive bidding by use of DA AGO Form 1025." (R. 75).

We submit that the opportunity is contained in the foregoing paragraph for the Base Salvage Officer to obtain, through deceit and deception, authorization to conduct a spot negotiated sale. We do not believe, as is apparently contended by appellant, that in order to sus-

tain a conviction in this case it would be necessary to show that the Lieutenant must have had authority to legally conduct a spot negotiated sale. When one has been bribed to do an act, the action taken in accordance with the bribe is, of course, not legal action. This is the fallacy in the argument submitted to this Court by appellant.

We find further that the regulations applicable provide that the Base Salvage Officer is to protect the interests of the Government and *to prevent errors, fraud or theft,* (R. 76), and that the Base Salvage Officer is required to maintain records. (R. 77).

The appellant in this case did propose that the records required of Lieutenant Apperson could be covered to deceive the Quartermaster of the Army if Lieutenant Apperson would accede to the proposal of the appellant.

> "A. Well on the way up there to that coffee shop he said that a deal like that would be easy enough to cover. He acted that he knew all about how records were kept and had quite a knowledge of the Quartermaster operations and said a deal like that would be easy enough to cover." (R. 90).

That certainly is a proposal to perpetrate a fraud upon the Government.

On November 22, the date on which the promise to give a bribe was made and the basis for the first count in the indictment, the appellant proposed that Lieutenant Apperson substitute useful items, i. e., salvage, for the scrap material that had been legitimately purchased by the appellant.

> "A. Yes, he wanted to get together with me or trade some of the scrap that he had legitimately purchased; he wanted me to substitute some of the useful items for this scrap, and he went on to say that he

would take any amount and that he would give me, said he would give me half a quid to a couple Gs, and he further said 'I have got the money right here' and slapped his brief case to indicate he had a couple Gs to take care of me." (R. 88).

That proposal, we submit, is in violation of the duties assigned by the regulations to the Base Salvage Officer, Lieutenant Apperson in this case.

The appellant's contention that the offense can only be committed if a bribe was offered or paid to induce Lieutenant Apperson to do an act in accordance with every legal requirement cannot be sustained. See *Daniels v. United States, 17 F. (2d) 339.*

In addition to the authority outlined in plaintiff's Exhibit Number 1, Lieutenant Apperson testified that he had authority to ship the salvage material after it had been loaded in the freight car.

"Q. Lieutenant Apperson, did you have the right or the authority after the stuff was in the car to send it off to Mr. Schneider?

A. Yes, I could have sent it off to him.

Q. Without violating any rule and regulation?

A. No.

Q. Without having been—

A. I wouldn't have sent the good stuff to him, no.

Q. Of course you wouldn't. I just asked you if you had the right to send that stuff through without any permission from anybody to Mr. Schneider in the very form that it was put on and the very manner that it was put on?

A. Yes, I could have sent it to him.

Q. Without getting paid for the merchandise?

A. Well, I had better explain a little. I am re-

sponsible for that equipment. If I had sent it to Mr. Schneider, I would have had to pay for it myself. (176).

Q. You would be responsible to whom?

A. To the United States Government.

Q. You mean a financial responsibility only?

A. That is right.

Q. And that is the only responsibility?

A. That is right.

Q. As long as you paid for the merchandise you would have been absolved from any responsibility?

A. I would have had to pay for the amount it cost the Government. That is what we call pecuniary liability.

Q. You would have to pay the $36,000?

A. I presume so.

Q. And that is all?

A. I presume so." (Record 189-190).

Lieutenant Apperson could properly expand on the authority conferred upon him by the regulations. He could testify concerning his duties.

Sabbatino, et al. v. United States,
298 F. 409.

This Court in the case of *Cohen, et al. v. United States, 144 F. (2d) 984 at 987* stated:

"(3) To constitute the offense of bribery within the meaning of 18 U. S. C. A. Sec. 207, it is sufficient if the action to be affected by the bribe was a part of any established procedure consistent with the authority of a governmental agency."

The evidence in the present case was sufficient to come within the foregoing.

The appellant submits that on the authority of *Blunden*

v. United States (C. C. A. 6, 1948) 169 F. (2d) 991, that this prosecution must fail. There is much said in that decision to sustain the conviction in this case.

> "The construction of the applicable statute, Sec. 91, now Sec. 201, Title 18 U. S. C. A., seems well settled in this jurisdiction. In United States v. Birdsall, 233 U. S. 223, 34 S. Ct. 512, 58 L. Ed. 930, the Court held that every action of a person acting on behalf of the United States that is within the range of his official duty comes within the purview of the section; that to constitute it official action, it is not necessary that it be prescribed by statute, but it is sufficient that it be governed by a lawful requirement of the department under whose authority the officer is acting; and that it is not necessary that the requirement should be prescribed by a written rule or regulation. In Rembrandt v. United States, 6 Cir., 281 F. 122, this Court held that the statute refers not merely to influencing a decision on any question, but also to influencing action on any matter, and that the statute was applicable to a situation where the advice and recommendation of the Government employee involved would be influential in securing the decision desired by the persons offering the bribe, even though the employee did not have the authority to make the final ruling."

The foregoing statement is in direct contradiction to appellant's contentions. The Court, in that case, pointed out that the charge made was not as broad as it might have been.

> "A careful reading of the information shows that it did not charge the appellants with the intent to influence Flisek to commit a fraud on the United States or to make the opportunity for the commission of such a fraud, although such additional offense is included within the terms of the statute."

In the present indictment the charge is broad and does include the allegations of fraud and opportunity for the commission of a fraud on the United States.

ON THE QUESTION OF IMPROPER REFERENCES TO OTHER OFFENSES AND THE EVIDENCE OF THE WITNESS WALKER REGARDING TELEPHONE CONVERSATIONS WITH APPELLANT.

The appellant has submitted that this case should be reversed because of improper references made to other offenses supposedly committed by the appellant and because the court permitted the Witness Walker to testify concerning telephone conversations had with the appellant.

In his argument on Point 3, appellant quotes from the opening statement of the prosecution and the reference made to a conversation with Lieutenant Apperson, which it was expected would be testified to. Both the court and counsel, as stated by the appellant, (Br. 23), advised the jury to disregard anything that was not testified to by witnesses during the trial. The Court particularly pointed out that the jury would be warned in the instructions concerning any statement of that kind. (R. 51-52). We find no request by appellant to instruct on this phase of the case.

Lieutenant Apperson could properly have been permitted to testify to any conversation had with the appellant during the course of his dealing with appellant. The Lieutenant, in his testimony, did not refer again to the matters objected to by the appellant.

> "A. We went into the coffee shop and got a cup of coffee and at that time Schneider began to tell me about how he operated at other bases and that he explained to me he operated quite a bit at a large depot down south and very carefully avoided telling me where that depot was. He said that he had dealt quite often through salvage agencies and at that time I think he said something about a cousin or somebody that had

been in the Quartermaster Corps during the war, that wasn't material the conversation at the time. I (69) told him, well, I was very noncommittal, I didn't say one way or another. By that time it was about 11:15 or between 11:30, and I had been Officer of the Day and up the night before and I went into the commercial transportation office where I could get a telephone and call a taxicab for Schneider." (R. 90).

That is as close as Lieutenant Apperson came to supplying the statements made by counsel in the opening address to the jury.

The Court was more than fair with the defense. We believe that statements made by appellant to Apperson about transactions that the appellant may have had at other bases were admissible. We call attention to just how fair to appellant the Trial Judge was:

"MR. LEIBOWITZ: I object to the answer. I object to the question on the ground it is wholly immaterial to the matters in the indictment and which cannot prove any offense in the indictment at all, and it was done after the act of the loading of the merchandise; I think the thing is over.

MR. LAMB: The question, your Honor, was what took place in the building in the salvage yard.

THE COURT: I think any conversation between them that refers some other matter has no connection with this is not relative to this case, this charge here. I will sustain the objection as to that. What is it, something in New Orleans?

MR. LAMB: I agree with you as far as the airplanes is concerned. Much of this evidence of the activities in other Army Depots is being offered for the purpose of showing that (85) the defendant well knew the transactions.

THE COURT: Well you have already shown his familiarity in this business that he is engaged in; he

has dealt with other salvage bases and stations but when it comes to anything that hasn't any bearing on or legal connection and unconnected entirely with this transaction, and Mr. Leibowitz's objection to that is sustained.

MR. LEIBOWITZ: May I have the answer stricken out?

THE COURT: Yes, as far as New Orleans or anything going on down there; was it New Orleans?

A. No, sir, New Mexico.

THE COURT: All right, it will apply to New Mexico." (R. 104-105).

Objection is made to the admission of a statement made by the Witness Aulgur. The appellant quotes a portion of the Witness' answer (Br. 24). The complete answer is as follows:

"A. Mr. Schneider referred to the property laying on the floor and asking if some kind of a deal couldn't be made. I informed him the property had been listed for sale and would be published in the very near future and if he cared to, he could look the property over and I would give him a form showing the property so he could submit a bid (210). And as I started to go after the form he made the remark that he thought I misunderstood him; he meant just a deal between the two of us. I further informed him that the property was up for sale and that nothing could be done; if he wanted to bid on it, that he could. And then I handed him a copy of the list we had made up to submit the property for sale. While I was giving him the list there was some remark made about a lot of money could be made, and approximately that time Lieutenant Apperson came in." (R. 221).

Most certainly, the witness could testify as to any conversation he had with the appellant Meyer Schneider. It was Sergeant Aulgur who met Meyer Schneider at the main gate of the Airbase and drove him to the salvage

office (R. 219-220). Whether this evidence was prejudicial or not is immaterial. It was admissible. It was the first conversation that Meyer Schneider had with anyone at the Airbase with reference to acquiring surplus property. Appellant contends, in his brief, that that evidence tended to show that he made illegal overtures to Sergeant Aulgur. The evidence was admissible and did tend to show that the defendant was interested in acquiring salvage property. Whether he acquired it through a fraudulent transaction with a Sergeant or a Lieutenant made little difference to him. It is one of the steps leading up to and directly related to the overtures immediately thereafter made to Lieutenant Apperson.

The evidence was admissible. The situation is similar to that considered by this Court in the case of *McCoy v. United States, 169 F. (2d) 776, 783*, wherein this Court stated:

> "(5, 6). Since a state of mind is difficult to prove precisely, evidence of surrounding circumstances may be admitted to prove intent. Shreve v. United States, 9 Cir., 103 F. (2d) 796, 803, and cases cited therein. In United States v. Uram, supra, 148 F. (2d) at page 189, the court admitted testimony of a 1938 transaction because it was pertinent to the instant charge in that it ' * * * bore heavily on his intent in the 1939 (instant) transaction. It proved his "knowledge" and threw light on his purpose in the 1939 transaction' (6). Evidence was properly admitted as to McCoy's attempt to induce Lahren to do that which later he succeeded in inducing Browning to do. Lahren's testimony as to advice and aid of McCoy and that McCoy made out applications which Lahren later refused to go on with, was properly admitted. No error was committed in regard to this subheading."

We next consider the testimony of the witness Walker

regarding the telephone conversations had with the appellant. It does not appear to us that any proper objections were made to the evidence if it was objectionable.

The appellant would have this Court believe that the telephone conversations were highly prejudicial and contends that they were irrelevant and immaterial to the issues being tried. The fact is that the telephone conversations testified to by Private Walker were all relevant to the scrap material that had been purchased by the appellant.

The first call, as related by the witness, was to the effect that the appellant wanted to know what the material he had purchased consisted of (R. 211), and that was all there was to it.

The second call, as related by the witness, is to the effect that the appellant wanted to know about any overage. In other words, excess in quantity, and in addition inquired as to whether or not he could be accommodated by way of separating the socks from the other material. (R. 212). There was nothing that could be construed as prejudicial to the appellant in that conversation and when the witness was cross-examined, he certainly testified that nothing improper had been said by the appellant during the conversation (R. 216-217).

In the third telephone conversation testified to by the witness Walker, the only thing the witness stated was that something was said by the appellant about coming out. Apparently, meaning come out to Montana. (R. 214-215). The third call was turned over to Lieutenant Apperson (R. 215). Lieutenant Apperson testified concern-

ing that telephone conversation without objection (R. 82-84).

We find nothing that could possibly be construed as prejudicial to the appellant in the testimony of the witness Walker. Yet, we find a statement in appellant's brief, "It is clear that the purpose of introducing it was to show that appellant was laying the ground work for some ulterior approach. Of course, this was flatly at variance with the theory of defense attempted to be developed on cross-examination of Apperson that appellant came to Montana at the instance and solicitation of Apperson." (Br. 27). The record just does not sustain the statement that there was an attempt to lay the ground work for some ulterior approach. The idea that this testimony was at variance with the theory of the defense attempted to be developed on cross-examination of Lieutenant Apperson that appellant came to Montana at the instance and solicitation of Apperson is an idea that we now find in the brief of appellant and is not an idea that can be found in the record in this case.

As a matter of fact, there could be no variance in this case so far as the defense is concerned. The evidence is all on one side, the Government's case. No evidence whatever was introduced by the defendant, appellant here. As stated by this Court in the case of McCoy v. United States, 169 F. (2d) 776, the evidence introduced by the Government stands upon its own intrinsic merit. The Government's case and the evidence presented is undisputed, unexplained and uncontradicted. See *Guerera v. U. S., 40 F. (2d) 338; Affronti v. U. S., 145 F. (2d) 3; McCoy v. U. S. 169 F. (2d) 776.*

We submit that the Court did not err in the particulars suggested by appellant under Point Number 3 and Point Number 4 set out in Appellant's Brief.

THE TRIAL COURT PROPERLY REFUSED APPELLANT'S COUNSEL THE RIGHT TO INSPECT THE MEMORANDA OF THE WITNESS MATTHEWS.

John J. Matthews, a Special Agent of the Federal Bureau of Investigation, was called to testify concerning his part in the apprehension of the appellant for the offense with which he is charged by indictment in this case. (R. 244-297).

The statements made in appellant's brief would tend to completely mislead this Court as to the fact. The witness did, at one time, during his direct examination, refer to notes that he had made (R. 272-273). He looked at these notes for the purpose of refreshing his recollection as to a conversation had with the defendant after the defendant had been arrested and arraigned before the United States Commissioner (R. 268). That is the only time that the witness referred to his notations. Only as to that one conversation with the defendant Schneider. During the cross-examination, counsel for the defendant addressed an inquiry to the Court:

"MR. LEIBOWITZ: Would I be permitted to examine those notations, your Honor?

THE COURT: Well I think not, if Mr. Matthews can testify, if he can testify from it.

MR. LEIBOWITZ: Well I would like to make a record here. I want to note my objections to the refusal of the court to permit me to examine the records made by the F. B. I. Agent, Mr. Matthews, to any transactions or negotiations he had with Meyer Schneider or anybody with reference to this case.

THE COURT: Well I will permit him with the notes he can look at the notes to, with reference to any conversation or interview with Meyer Schneider, the defendant. But he has made notes no doubt about many other things in connection with the case that he couldn't testify to and wouldn't be competent evidence at all, and I don't think you have any right to examine notes of that kind. If it was (272) competent evidence here, he probably consulted with the United States Attorney and found out what would be competent evidence and what would be admissible and what would not. Now your wholesale request, of course, will be denied.

MR. LEIBOWITZ: I am only interested in those notes which have to do with his investigation of the case is all.

THE COURT: I am interested in those notes which have to do with competent evidence here in this case. I will overrule your objection.

MR. LEIBOWITZ: I have my exception.

THE COURT: Yes." (R. 280-281).

A few questions following the above, the Court very properly pointed out to counsel that general fishing expeditions were not proper.

"THE COURT: He spoke about notes and conversations with the defendant. Now you are inquiring about something that probably would not be admissible in evidence.

MR. LEIBOWITZ: I want to find out if he has anything there that may contradict him. There may very well be something written down that contradicts what he says.

THE COURT: I don't think you have the right to go (273) on a general fishing expedition of that kind.

MR. LEIBOWITZ: All right, I note my objection and I would like to have my exception, that is all.

THE COURT: It has already been passed on two or three times." (R. 281-282).

All of the Special Agent's records or just *any* notes or records, collateral or remote, concerning "any transactions or negotiations he had with Meyer Schneider or anybody with reference to this case" (R. 280), are not here, as a matter of unqualified right, subject to inspection by the defense for cross-examination purposes. Even if, in a similar case, there were a proper foundation—and there is none at all here—the matter of inspection, and its manner and limits, would necessarily be very largely within the sound discretion of the Court.

Note (R. 280-281) that the Court said that inspection would be permitted *"with reference to any conversation or interview with Meyer Schneider, the defendant.* But he (F. B. I. Agent John J. Matthews) has made notes no doubt about many other things in connection with the case that he couldn't testify to and wouldn't be competent evidence at all, and I don't think you have any right to examine notes of that kind. * * * Now *your wholesale request,* of course, will be denied."

Those portions of the printed record which are quoted immediately above show quite clearly that the Court virtually suggested three times that defense counsel forthwith narrow his request to those precise notes with which Special Agent Matthews had refreshed his recollection on direct examination: or at least that he particularize his request so that the Court, in passing upon it, would know whether a mere memory link, or notes reasonably cognate, were sought to be inspected. No such request was made, despite what are almost invitations by the

Court to do so. The Court was justified beyond dispute in allowing no "fishing expedition" into *all* of Special Agent Matthews' notes.

The appellant cites, as supporting his position, a decision of this Court, *Brownlow v. United States, 8 F. (2d) 711.* The Brownlow case seems to support the Government's case rather than the appellant's. The case, as we read it, holds that opposing counsel may be entitled to inspect a document used by a witness to refresh his recollection. That right has a definite limitation. Opposing counsel is not entitled to inspect the entire document. Opposing counsel may inspect only those parts which are called to the attention of the witness or which relate to the subject on which refreshment of recollection is attempted. We submit that not one case cited by appellant will sustain his position. The rule is stated correctly in *Harper v. United States, 143 F. (2d) 795, 803:*

> "(19). It is next contended that the court unduly restricted cross-examination of certain government witnesses. One of the victims, Cecil Clyde Goff, is said by appellants to have testified to a certain date by reference to a memorandum and it is urged that the denial of a request by counsel for defendants to see the memorandum constituted reversible error. The record is very obscure as to what appellants desired to see. Assuming that the record is as contended by appellants that a memorandum was used to fix a date, the error, if any, would seem to be harmless. Taylor v. United States, 8 Cir., 19 F. (2d) 813; Miller v. United States, 5 Cir., 126 F. (2d) 771."

A situation similar to the one presented in this case was presented in the case of *Little v. United States, 93 F. (2d) 401, 406:*

> "(1). It is a generally accepted rule of evidence that

the defendant in a criminal case or his counsel has the right, upon proper request or demand, to inspect and use, for purposes of cross-examination, any paper or memorandum which is used by a witness on direct examination for the purpose of refreshing his present recollection. Lennon v. United States, 20 F. (2d) 490, 493 (C. C. A. 8); Taylor v. United States, 19 F. (2d) 813, 818 (C. C. A. 8); Morris v. United States, 149 F. 123, 126 (C. C. A. 5). It was pointed out by Judge Stone in his concurring opinion in the Taylor case, supra, that a conviction will not be reversed for a denial of this right if it appears clearly on the record that no prejudice resulted from the error. In that case the memorandum was used by the witness on direct examination for the purpose only of refreshing her recollection as to whether the circumstance to which she testified occurred on the 21st or on the 22nd day of the month; and the exact date being immaterial the denial of the right was held to be without prejudice."

In reading this record, the Court will see that the refusal to allow opposing counsel to see the memorandum which Matthews had made in connection with the case and used solely to refresh his memory on a single question was far from being the circumstance that tipped the scales against Schneider and caused the verdict of guilty.

THE COURT FULLY AND FAIRLY CHARGED THE JURY AND THERE WAS NO EVIDENCE OF ENTRAPMENT TO EITHER SUSTAIN A JUDGMENT OF ACQUITTAL OR TO REQUIRE THE SUBMISSION OF THAT ISSUE TO THE JURY.

The objection is made that the Court charged the jury that the offense could be committed by negligence. Excerpts of the pertinent charge objected to are set forth in appellant's brief (Br. 30-31). The complete statement

including what has been set forth by appellant and what has been omitted is as follows:

"Now, of course, intent, the intent is always an element, necessary ingredient to be established in a case of this kind. This is a felony case and the jury before they can convict the defendant must find here in this case beyond a reasonable doubt a joint operation of act and intent, or what we call in law criminal negligence. Now criminal negligence in that connection means the doing of an act with a reckless disregard of the consequences, not caring particularly what happened. Now you are unable, of course, any of you to look into the mind of the defendant and determine with what intent he acted if you believe that he acted in accordance with the charge contained in this indictment. But in order to determine that intent you must take into account all of the evidence in the case and all of the circumstances that you have observed during the progress of the trial in connection with the case and the facts of the case and sometimes circumstances are very important and afford very important evidence, and that is for you to say because you judge of the facts and the circumstances the same as you do the testimony of the witness from the witness stand. But you remember in that connection you are to recall the presumption that every sane person is presumed to intend the natural and usual consequences of his own deliberate act. However, the court instructs that as heretofore that you must be satisfied beyond a reasonable doubt of his guilt before you can find him guilty; that is, you must be satisfied beyond a reasonable doubt that he acted, that if he acted at all with a criminal, that is to say, with an evil intent to violate the law." (R. 364-365).

There can be no doubt in this case but that the charge of the Court fully and fairly stated the law applicable to the evidence before the jury. That is what is required in accordance with the rule laid down by this Court in

McCoy v. United States, 169 F. (2d) 776, 784-786, and in *DePratu v. United States, 171 F. (2d) 75, 77.*

We have heretofore called the attention of the court to the fact that defendant's requested instructions should not properly be considered as a part of the record on appeal in this case.

The requested instructions which were refused are urged upon this Court only insofar as they relate to entrapment. The rule on entrapment is:

> "One who is instigated, induced, or lured by an officer of the law or other person, for the purpose of prosecution, into the commission of a crime which he had otherwise no intention of committing may avail himself of the defense of 'entrapment.' Such defense is not available, however, where the officer or other person acted in good faith for the purpose of discovering or detecting a crime and merely furnished the opportunity for the commission thereof by one who had the requisite criminal intent." 22 C. J. S. Sec. 45, Page 99.

There just wasn't any evidence on entrapment. The idea for perpetrating a fraud upon the Government by obtaining salvage material from the Airbase at Great Falls, Montana, did not originate with Lieutenant Apperson. That idea originated with the appellant. The appellant cannot even through a strained analysis of the evidence in this case sustain the contention that entrapment existed.

On November 22nd, the suggestions and proposals originated with the appellant (R. 86-90).

When Schneider arrived at the Salvage Office on November 23rd, Apperson made no suggestions to Schneider. He testified upon cross-examination (R. 204):

> "A. I placed the file with those turn-in slips in front of him.

A. Yes, sir. I just put this thing in front of him to see what he would do."

From there on, Schneider proceeded to obtain possession of the salvage material described in the turn-in slips referred to. Lieutenant Apperson acceded to his request. The plan of bribing Apperson originated with the appellant and the Lieutenant merely gave Schneider an opportunity to carry out the scheme that he had in mind. That is not entrapment.

Patton, et al., v. United States,
42 Fed. (2d) 68.

Buckley v. United States,
33 F. (2d) 713.

In the last mentioned case, the Court stated at Page 718:

"It is plain that, if the making of any offer of bribe by Buckley was induced or brought about by Eckhart, the defense of entrapment would have merit; and equally plain that, if Buckley first made the offer, without any inducement by Eckhart, then all the things which Eckhart afterwards did, in assuming to go along and in providing the way for Buckley to send incriminating telegrams and make incriminating admissions which would be overheard, were legitimate effort to get evidence which would tend to prove the crime which had already been committed."

We subscribe to the quotation in appellant's brief (Br. 40) taken from the decision of the court in *Sorrells v. United States, 287 U. S. 435, 77 L. Ed. 413.*

The evidence in the present case does not tend to prove nor indicate in any way that there was an endeavor to cause or to create crime in order to punish it. There was no violation of public policy in this case. Public policy in this case would demand that Lieutenant Apperson do

just exactly what he did do. The idea of bribery originated in thought and in deed with the appellant.

The appellant cites, in support of his case, two decisions of this Court:

Sam Yick v. United States,
240 F. 60;

Woo Wai v. United States,
223 F. 412.

Neither of the foregoing cases support the idea that there was entrapment in this case. The court in those cases was concerned with officers of the law having incited the party to commit the crime charged and lured him on to its consummation. There was no luring of Schneider. Schneider arrived in Great Falls, Montana, and went to the Great Falls Airbase prepared to obtain property other than that which he had purchased from the Government legitimately. His first contact at the Airbase was with Sergeant Aulgur and he immediately suggested the possibility of making a deal with the Sergeant. (R. 221). The record is clear that when he found he would be required to deal with Lieutenant Apperson rather than the Sergeant, his whole program was to obtain the property by fraud. Public policy rather than frowning on the conduct of Lieutenant Apperson in going along with Schneider so that he might be apprehended would demand that Lieutenant Apperson do what he did do to prevent

frauds upon the Government and apprehend he who would promise a bribe and give a bribe.

The judgment should be affirmed.

Respectfully submitted,

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H 12501

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MEYER SCHNEIDER,
Appellant,
against
UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF

In the present brief we shall attempt concisely to reply to the several arguments made by the Government.

At the outset, appellee (pp. 1-2) takes exception to the form of the record as not being in conformity with the rules. Our original intention was to print the entire record, but the requests to charge were unfortunately not available at the time of printing, with the result that they were not included. When they finally came to hand, it was decided to append them to the brief in order that the Court might properly refer to them. Inasmuch as they relate solely to points of law and do not impinge upon controverted factual issues, appellee could in no manner be prejudiced by their presentation as part of our original brief, and we are surprised that the matter has been made the occasion for any comment whatsoever.

The Government's position with regard to the duties of Lieutenant Apperson (p. 4) presently appears to be that they may be enlarged by the testimony of Major Redding (R. 140-142). Elsewhere the lieutenant's duties are purportedly described in Government's Exhibit 7 (R. 141, 340), which was the special order giving him, among other things "primary duty as salvage and property disposal officer."

This, as we have pointed out in our main brief (p. 20) was not the same thing as "Air Force and Base Salvage Officer," the designation employed in the indictment (R. 2-3). The Government tried further to fortify its position by reading into the record certain excerpts from Exhibit 1, a 700-page manual (R. 70-77). Incidentally, in relying on this manual, we submit that appellee has misstated the language of the record when it declares (p. 5), "He was required to protect the interests of the Government and to prevent errors, fraud or theft." A reference to the record itself and to the very page referred to in support of the above assertion (R. 76) discloses that the passage in question, as read by the United States Attorney, was:

> "And under the paragraph, page 584, marked 'Weight, Count and Inspection': 'To protect the interests of the Government and to prevent errors, fraud, or theft, all salvage property sold will be inspected by the salvage officer or his representative at the time of delivery or shipment to purchasers. Salvage officers will be on the alert to prevent dishonest practices in weighing property. Scales will be periodically examined'."

In other words, the regulations included an inspection requirement whose declared purpose was to protect the Government's interests and to prevent errors, fraud or theft, and appellee has seized upon this language and extended it so as to make such protection and prevention a general duty of the salvage officer.

In the same connection we submit that the testimony of Major Redding should not have been received at all for the purpose of enlarging the alleged duties of Lieutenant Apperson, and objection and exception were duly taken to attempts directed to this end (R. 146-147). If there had been no special order at all, the testimony might conceivably have been pertinent, but since the duties were defined or specified in the special order, that should have been conclusive. Appellee should not be permitted to sustain a vital deficiency in its proof by reliance on evidence that

s not competent. This is particularly so since the Government in the first instance offered the document itself as evidence of the duties it sought to impute.

As to the sufficiency of the indictment, appellee (p. 8) minimizes the caption of the first count ("Offer of Bribe") as an inconsequential and unprejudicial mistake. In the case at bar this was not a trivial matter, for defendant himself was understandably misled. The Trial Court was evidently confused and used the words "offer" and "promise" interchangeably. With the Court evidently regarding both concepts as identical, it is natural that defendant, too, should have difficulty in defending himself against a charge that was ambiguous at best.

Appellee misapprehends our purpose in citing *Blunden* v. *United States,* 169 F. 2d 991. The case turned entirely upon the information's failure to allege that the officer involved had the authority and jurisdiction to act in the matter, a feature declared to be "the essential element of the offense". Yet appellee makes the irrelevant observation that the *Blunden* information omitted to charge the commission of a fraud against the United States; indeed, in every case the effect of improperly influencing the decision or action is to commit a fraud against the United States or give opportunity therefor, for without such fraud or opportunity there can be no offense.

Although we cited in our main brief (pp. 5-6), *United States* v. *Kemler,* 44 F. Supp. 649, for our contention that both offering and promising are not synonymous inasmuch as the statute differentiates between them, and the further proposition that an indictment is defective which fails to allege that the person acting in an official capacity was being bribed in connection with his line of duty, appellee fails to answer this argument but relies on *United States* v. *Bickford,* 168 F. 2d 26, involving the authority of the clerk of a court to administer an oath, the indictment being for perjury. Needless to say, a court can always take judicial notice of such power, and the situation is not even comparable to that of a base salvage officer, concerning

whose duties no court or lawyer could venture more than a conjecture in the absence of specific evidence on the subject. *Catrino* v. *United States,* 176 F. 2d 884 (cited by appellee, p. 10), dealt with two separate statutes, to wit, subornation of perjury and obstruction of justice, and it was held that each separate step in a prohibited transaction might constitute a distinct criminal offense.

We urged originally (pp. 20-21) that the record is devoid of proof showing that Lieutenant Apperson could have ordered the removal of merchandise from warehouse 1045 or for that matter from any other place without complete compliance with the public sale and competitive bidding routine; that his authority to make spot sales was limited to scrap lumber; and that according to his own testimony he could not inaugurate a proceeding for the disposition of property without the prior approval and cooperation of Lieutenant Greene. From the circumstances surrounding these limitations on his authority we argued that there was actually nothing for him to decide and no action to be taken by him. In this connection appellee does not argue that the merchandise legitimately purchased by appellant was not fully paid for in accordance with all the requirements of law and in pursuance of the agreement which had been entered into; in fact, the record abundantly establishes full payment and conformity. Appellee argues that the statute prohibits the commission of a fraud and also prohibits the inducing to do or omit to do an act in violation of lawful duty. However, the important thing to remember is that the influencing and the fraud must concur; the unlawful inducing must tend to the commission of a fraud on the United States; if the two factors do not coexist, then there is no bribery within the meaning of the statute. We submit that the Government strains its argument in having to establish that there was an influencing with respect to an actual duty and reiterates (p. 13), even italicizing the contention, that the Base Salvage Officer was required by the regulations to protect the interests of the Government and to prevent errors, fraud or theft. We have already

shown, supra, that this argument is predicated upon a garbling of the language of the record and the pertinent regulation. It is sufficiently clear that the influencing condemned by the statute must relate to something with respect to which the official in question has legal power to act. If what were involved herein were the disposition of scrap lumber, and appellant were shown to have exercised an improper influence to perpetrate a fraud in that connection, there might be a sufficient case within the terms of the law. But as the facts are disclosed by this record, the Government's argument is unsupported either by fact or authority.

Appellee selects certain excerpts from the record and quotes them in its brief (pp. 14-15) in a fantastic attempt to show that he might conceivably have sent merchandise to appellant with no responsibility other than a pecuniary liability on his part to the Government. This passage is completely at variance with everything elsewhere officially shown, whether by regulation or testimony, and it is evidently a ridiculous hypothetical assumption by the witness and the prosecution of some imaginary power on the part of Lieutenant Apperson, invoked solely to make the accusation herein legally tenable. If the Court may not take judicial notice of the lack of any such power, surely the bulk of the record contains no evidence to support any such statement.

Appellee cites the *Blunden* case (169 F. 2d 991) for the argument that the statute covers not merely an influencing to make a decision but also a situation where the advice and recommendation of the official would be influential in securing the decision desired—irrespective of the absence of authority in the employee to make the final ruling. The difficulty with this argument is that there is no evidence in the record of any potency attaching to the advice or recommendations of Lieutenant Apperson. In the absence of evidence that appellant would be in a position to obtain the merchandise legally through the intervention of Lieutenant Apperson, the argument based on such a supposed factor completely collapses.

In answer to our argument of reversible error by reason of the reception of the testimony of the witness Walker, the Government argues (p. 21), "It does not appear to us that any proper objections were made to the evidence if it was objectionable." In making this assertion, the Government evidently overlooks or ignores the objection and exception (R. 212-213), following which the witness by his testimony placed a rather crooked complexion on appellant. Appellee declares further that it finds nothing (p. 22) that could be possibly construed as prejudicial to appellant in the testimony of Walker. Certainly, the imputation to appellant of language like "I am just an everyday guy; can you help me out?" was obviously mentioned (R. 213) to fasten upon appellant the onus of making overtures directed towards some ultimate evil end. Appellee in the same connection belittles our contention that the testimony was at variance with our theory developed on Apperson's cross-examination that appellant came to Montana at Apperson's instance. If the acts of which appellant was accused were wrongful, his prior conduct was clearly of no materiality; knowing what he did before would tend to prove or disprove his intent; the rule permitting other transactions is limited to cases where the acts of an accused are equivocal and susceptible of varying interpretations. The Government declares that this is a theory which it now finds in our brief but that it is "not an idea that can be found in the record in this case." This assertion overlooks R. 132-133 as well as R. 177-179, from which it actually appeared that Lieutenant Apperson made a collect telephone call to appellant and told him that he had better come to Montana. This is an instance of the manner in which the Government blandly ignores important elements of the case in its efforts to meet our arguments. In the same connection it is evident throughout that the authorities in Montana did go out of their way to accommodate appellant, and that Apperson proceeded to hire government labor to do the loading for appellant.

On the issue of withholding from appellant the records used by the special agent to refresh his recollection, the Government cites (p. 26) two cases which are obviously not applicable, one of them (*Harper* v. *United States,* 143 F. 2d 795) dealing with the verification of an immaterial date and the other (*Little* v. *United States,* 93 F. 2d 401) being substantially to the same effect—a witness using a memorandum merely to refresh her recollection as to whether a certain incident occurred on the 21st or 22nd of the month.

Appellee declares (p. 29) that "There just wasn't any evidence on entrapment." Of course, the Government's *ipse dixit* does not make it so. There is not need to review again the evidence discussed in our main brief on this vital feature of the case (pp. 31-40). It is quite patent that when the jacket file was placed by Lieutenant Apperson before appellant, the disposal of articles in warehouse 1045 was not then pending in any official capacity before Apperson, and the procedure was followed for one purpose only, namely, to interest and induce appellant to offer a bribe. The approach was the outcome of an arrangement with the F.B.I. and the prosecuting officialdom, and if the picture disclosed by this record does not constitute at least an arguable question of entrapment, it would be difficult to envisage one. In any event the issue required adjudication by the jury.

For all of the foregoing reasons, as well as those set forth in appellant's main brief, the judgment appealed from should be reversed and the indictment dismissed.

Respectfully submitted,

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